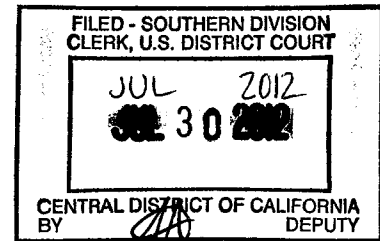


I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY
FIRST CLASS MAIL, POSTAGE PREPAID, TO ALL COUNSEL ~~OR PARTIES~~ *Petitioner*
AT THEIR RESPECTIVE MOST RECENT ADDRESS OF
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DATED: 7/30/12

D. Vo
DEPUTY CLERK



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

EDWIN ANTONIO ALFARO,

Petitioner,

v.

RANDY GROUNDS, Warden,

Respondent.

Case No. CV 12-06338 MMM (AN)

**ORDER TO SHOW CAUSE RE
DISMISSAL OF PETITION FOR
WRIT OF HABEAS CORPUS BY A
PERSON IN STATE CUSTODY AS
TIME-BARRED**

I. BACKGROUND

Before the Court is a petition for writ of habeas corpus ("Petition") brought by Edwin Antonio Alfaro ("Petitioner"), a state prisoner proceeding *pro se*. The Petition is brought pursuant to 28 U.S.C. § 2254 and raises two claims directed at Petitioner's April 21, 2003 conviction in the California Superior Court for Los Angeles County (case no. VA075774) of forcible rape, forcible oral copulation, attempted sodomy by use of force, first degree burglary, and sentence enhancements, as well as his indeterminate sentence of 38 years to life in state prison. For the reasons set forth below, Petitioner is ordered to show cause why his Petition should not be dismissed with prejudice because it is time-barred.

///

II. DISCUSSION

A. Standard of Review

Habeas Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts (“Habeas Rules”), 28 U.S.C. foll. § 2254, requires a judge to “promptly examine” a habeas petition and “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.” Local Rule 72-3.2 of this Court also provides “[t]he Magistrate Judge promptly shall examine a petition for writ of habeas corpus, and if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief, the Magistrate Judge may prepare a proposed order for summary dismissal and submit it and a proposed judgment to the District Judge.” C.D. Cal. R. 72-3.2. Further, an untimely habeas petition may be dismissed *sua sponte*, however, the district court must give the petitioner adequate notice and an opportunity to respond before doing so. *Day v. McDonough*, 547 U.S. 198, 209-10, 126 S. Ct. 1675 (2006); *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir. 2001); *see also Wood v. Milyard*, --- U.S. ---, 132 S. Ct. 1826, 1834 (2012) (reaffirming *Day*’s holding that district courts are permitted to consider, *sua sponte*, the timeliness of a state prisoner’s habeas petition, and itself holding that “courts of appeals, like district courts, have the authority - though not the obligation - to raise a forfeited timeliness defense on their own initiative.”).

B. Statute of Limitations

The Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which establishes a one-year statute of limitations for state prisoners to file a habeas petition in federal court. 28 U.S.C. § 2244(d)(1); *see Lindh v. Murphy*, 521 U.S. 320, 327-37, 117 S. Ct. 2059 (1997). In most cases, the limitations period is triggered by “the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

1 The face of the Petition and relevant state court records^{1/} establish the following
 2 relevant facts. On April 21, 2003, Petitioner was convicted of the above offenses and
 3 sentenced on December 1, 2003. On May 9, 2005, the California Court of Appeal
 4 affirmed the judgment of conviction (case no. B172145). The California Supreme
 5 Court then denied review of the court of appeal's decision on July 13, 2005 (case no.
 6 S134582). (Pet. at 2; state court records.) Petitioner does not appear to have filed a
 7 petition for certiorari with the United States Supreme Court.

8 Therefore, for purposes of AEDPA's limitations period, Petitioner's judgment
 9 became final on October 11, 2005, the ninetieth day after the state high court denied
 10 his petition for review and the last date for him to file a petition for certiorari with the
 11 Supreme Court. *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). The statute of
 12 limitations then started to run the next day, on October 12, 2005, and ended a year
 13 later on October 12, 2006. 28 U.S.C. § 2244(d)(1)(A); *see also Patterson v. Stewart*,
 14 251 F.3d 1243, 1245-47 (9th Cir. 2001) (the limitations period begins to run on the
 15 day after the triggering event pursuant to Fed. R. Civ. P. 6(a)). Petitioner did not
 16 constructively file his pending Petition until July 16, 2012 -- 2,104 days
 17 (approximately 5 years and 9 months) after the expiration of the limitations period.^{2/}
 18 Accordingly, absent some basis for tolling or an alternative start date to the limitations
 19

20 ^{1/} The Court takes judicial notice of Petitioner's records in the state appellate
 21 courts, which are available on the Internet at <http://appellatecases.courtinfo.ca.gov>
 22 ("state court records"). *See Smith v. Duncan*, 297 F.3d 809, 815 (9th Cir. 2002) (federal
 23 habeas courts may take judicial notice of relevant state court records), *overruled on*
other grounds as recognized in Cross v. Sisto, 676 F.3d 1172 (9th Cir. 2012).

24 ^{2/} Pursuant to the "mailbox rule," a *pro se* prisoner's federal habeas petition is
 25 deemed to be filed on the date the prisoner delivers the petition to prison authorities for
 26 mailing to the clerk. *Houston v. Lack*, 487 U.S. 266, 270-71, 108 S. Ct. 2379 (1988);
 27 *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001); *see also* Habeas Rule 3(d). For
 28 purposes of the timeliness analysis, and absent any evidence to the contrary, the Court
 finds Petitioner constructively filed the Petition by delivering it to the prison mail
 system on July 16, 2012, which is reflected on the envelope containing the Petition.

1 period under 28 U.S.C. § 2244(d)(1), the pending Petition is time-barred.

2 **C. Statutory Tolling**

3 AEDPA includes a statutory tolling provision that suspends the limitations
4 period for the time during which a “properly-filed” application for post-conviction or
5 other collateral review is “pending” in state court. 28 U.S.C. § 2244(d)(2); *Waldrip v.*
6 *Hall*, 548 F.3d 729, 734 (9th Cir. 2008); *Bonner v. Carey*, 425 F.3d 1145, 1148 (9th
7 Cir. 2005). An application is “pending” until it has achieved final resolution through
8 the state’s post-conviction procedures. *Carey v. Saffold*, 536 U.S. 214, 220, 122 S. Ct.
9 2134 (2002). However, to qualify for statutory tolling, a state habeas petition must be
10 filed before the expiration of AEDPA’s limitations period. *See Ferguson v. Palmateer*,
11 321 F.3d 820, 823 (9th Cir. 2003) (“[S]ection 2244(d) does not permit the reinitiation
12 of the limitations period that has ended before the state petition was filed.”); *see also*
13 *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) (“A state-court petition []
14 that is filed following the expiration of the limitations period cannot toll that period
15 because there is no period remaining to be tolled.”).

16 The face of the Petition and relevant state court records establish Petitioner filed
17 two state habeas petitions, one in the court of appeal (case no. B238779) and one in
18 the California Supreme Court (case no. S201179). However, the first of those petitions
19 was not filed until January 31, 2012 -- 1,937 days after the limitations period expired
20 on October 12, 2006. As a result, Petitioner is not entitled to any statutory tolling.
21 *Ferguson*, 321 F.3d at 823; *Webster*, 199 F.3d at 1259.

22 **D. Alternative Start of the Statute of Limitations**

23 **1. State-Created Impediment**

24 In rare instances, AEDPA’s one-year limitations period can run from “the date
25 on which the impediment to filing an application created by State action in violation
26 of the Constitution or laws of the United States is removed, if the applicant was
27 prevented from filing by such State action.” 28 U.S.C. § 2244(d)(1)(B). Asserting that
28 the statute of limitations was delayed by a state-created impediment requires

1 establishing a due process violation. *Lott v. Mueller*, 304 F.3d 918, 925 (9th Cir.
 2 2002). The Petition does not set forth any facts for an alternate start date of the
 3 limitations period under this provision.

4 **2. Newly Recognized Constitutional Right**

5 AEDPA provides that, if a claim is based upon a constitutional right that is
 6 newly recognized and applied retroactively to habeas cases by the United States
 7 Supreme Court, the one-year limitations period begins to run on the date which the
 8 new right was initially recognized by the Supreme Court. 28 U.S.C. § 2244(d)(1)(C).
 9 The Petition does not set forth any facts for an alternate start date of the limitations
 10 period under this provision.

11 **3. Discovery of Factual Predicate**

12 AEDPA also provides that, in certain cases, its one-year limitations period shall
 13 run from “the date on which the factual predicate of the claim or claims presented
 14 could have been discovered through the exercise of due diligence.” 28 U.S.C. §
 15 2244(d)(1)(D); *Hasan v. Galaza*, 254 F.3d 1150, 1155 (9th Cir. 2001). The Petition
 16 does not set forth any facts for an alternate start date of the limitations period based
 17 upon the late discovery of the factual predicate.

18 **E. Equitable Tolling**

19 AEDPA’s limitations period “is subject to equitable tolling in appropriate
 20 cases.” *Holland v. Florida*, --- U.S. ---, 130 S. Ct. 2549, 2560 (2010). However,
 21 “[e]quitable tolling is justified in few cases” and “the threshold necessary to trigger
 22 equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule.”
 23 *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003) (quoting *Miranda v. Castro*, 292
 24 F.3d 1063, 1066 (9th Cir. 2002)).

25 “[A] litigant seeking equitable tolling bears the burden of establishing two
 26 elements: (1) that he has been pursuing his rights diligently, and (2) that some
 27 extraordinary circumstance stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408,
 28 418, 125 S. Ct. 1807 (2005); *Lawrence v. Florida*, 549 U.S. 327, 336, 127 S. Ct. 1079

(2007). *Pace*'s diligence prong requires the petitioner to show he engaged in reasonably diligent efforts to file his § 2254 petition throughout the time the limitations period was running. *Mendoza v. Carey*, 449 F.3d 1065, 1070 (9th Cir. 2006); *see also Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (equitable tolling requires a showing that "the party seeking equitable tolling must have acted with reasonable diligence throughout the period he seeks to toll" and "extraordinary circumstances prevented him from filing his petition on time"). The petitioner must also demonstrate that he exercised reasonable diligence in attempting to file his habeas petition after the extraordinary circumstances began, otherwise the "link of causation between the extraordinary circumstances and the failure to file [is] broken." *Spitsyn*, 345 F.3d at 802. *Pace*'s "extraordinary circumstances" prong requires the petitioner to "additionally show that the extraordinary circumstances were the cause of his untimeliness, and that the extraordinary circumstances made it impossible to file a petition on time." *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009) (internal quotations and citations omitted). Further, equitable tolling determinations are "highly fact-dependent," *Mendoza*, 449 F.3d at 1068, and the petitioner "bears the burden of showing that equitable tolling is appropriate." *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9th Cir. 2005).

Additionally, although "we do not require [the petitioner] to carry a burden of persuasion at this stage in order to merit further investigation into the merits of his argument for [equitable] tolling," *Laws v. Lamarque*, 351 F.3d 919, 924 (9th Cir. 2003), "[w]here the record is amply developed, and where it indicates that the [alleged extraordinary circumstance did not] cause the untimely filing of his habeas petition, a district court is not obligated to hold evidentiary hearings to further develop the factual record, notwithstanding a petitioner's allegations" *Roberts v. Marshall*, 627 F.3d 768, 773 (9th Cir. 2010); *see also Elmore v. Brown*, 378 Fed. Appx. 664, 666 (9th Cir. 2010) ("[W]here the record is sufficient to permit the district court - and us on appeal - to evaluate the strength of the petitioner's [equitable tolling] claim, the

1 district court does not necessarily abuse its discretion if it denies the petitioner a
2 hearing.”) (cited pursuant to Ninth Circuit Rule 36-3).

3 The Petition does not set forth any facts for equitable tolling.

4 **ORDER**

5 Based on the foregoing, the Court finds this action is untimely. Accordingly,
6 Petitioner shall have until **August 17, 2012**, to file a written response and show cause
7 why his Petition should not be dismissed with prejudice because it is time-barred. In
8 responding to this Order, Petitioner must show by declaration and any properly
9 authenticated exhibits what, if any, factual or legal basis he has for claiming that the
10 Court’s foregoing analysis is incorrect, or that AEDPA’s one-year statute of
11 limitations should be tolled, or the start date extended.

12 **Petitioner is warned that if a timely response to this Order is not made,**
13 **Petitioner will waive his right to respond and the Court will, without further**
14 **notice, issue an order dismissing the Petition, with prejudice, as time-barred.**

15 **Further, if Petitioner determines the Court’s above analysis is correct and**
16 **the Petition is clearly time-barred, he should consider filing a Request For**
17 **Voluntary Dismissal of this action pursuant to Fed. R. Civ. P. 41(a)(1) in lieu of**
18 **a response to this Order.**

19
20 IT IS SO ORDERED.

21
22
23 DATED: July 30, 2012

24 
25 **ARTHUR NAKAZATO**
26 **UNITED STATES MAGISTRATE JUDGE**
27
28